No. 04-401

IN THE

Supreme Court of the United States

JOSE VICENTE SANCHEZ,

Petitioner,

v.

MINSON CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MINSON CORPORATION

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QUESTION PRESENTED

Whether the district court abused its discretion by dismissing Petitioner's complaint, pursuant to Federal Rule of Civil Procedure 4(m), for failure to complete service of process?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Minson Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Petitioner Jose Vicente Sanchez ("Petitioner" or "Sanchez") sued his employer, Respondent Minson Corporation ("Respondent" or "Minson"), for age and national origin discrimination after he was laid off from his job as a welder in July, 2001. The lawsuit, commenced in August, 2002, was never properly served on Minson. In February, 2003, the district court ordered Sanchez to show cause why his complaint should not be dismissed and granted him 10 more days to complete service. When he failed to do so, the court dismissed the complaint without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

Sanchez timely appealed the dismissal to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the dismissal.

This Court should deny the petition because there is no split of authority among the circuits. Rule 4(m) provides that when the summons and complaint have not been served within 120 days after filing, the court shall dismiss the action or direct that service be effected within a specified time. It appears that, in every circuit to consider the issue, decisions to dismiss for failure to complete service of process are reviewed for abuse of discretion.

The district court followed the procedures prescribed by Rule 4(m). The court provided Sanchez with additional time to complete service of process as well as explicit directions about how to do so. But Sanchez chose to stand by his prior attempts at service and disregarded the court's instructions.

Because Sanchez failed to follow the district court's instructions and insisted that his actions to effect service of

process were sufficient, the district court determined that good cause did not exist to further extend the deadline for service. In so ruling, the court did not abuse its discretion. The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Minson is a furniture manufacturer located in Montebello, California. Mr. Sanchez, a native of Columbia, worked for Minson as a welder from 1996 until he was laid off in July, 2001 as part of a mass layoff necessitated by a slowdown in business.[1] Mr. Sanchez was 58 years old when he was hired and 62 at the time he was laid off.

Sanchez filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of his age and national origin.[2] After investigation, the EEOC determined there was no evidence that federal law had been violated.

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1. Because Minson was never required to answer Sanchez's complaint, these facts are taken from the complaint and the petition. Minson's response to the EEOC charge sets forth a slightly different sequence of events. In reality, Mr. Sanchez was initially hired to work for Minson in May, 1996. He was laid off in August, 1996 and recalled to work in August, 1997. Mr. Sanchez continued to work for Minson until he was laid off again in July, 2001, as part of a mass layoff necessitated by a slowdown in business. Over 20 other employees in the welding department where Mr. Sanchez worked were laid off around the same time.

2. Sanchez avers that the EEOC Charge "eventually brought an offer from the Defendant for 200 to 300 days of pay." Pet. at 5 and 7. Even if this were true, which it is not, such a settlement offer would be inadmissible to establish liability, *Mundy v. Household Finance Corp.*, 885 F.2d 542, 546 (9th Cir. 1989), and immaterial as to the sufficiency of service of process now at issue.

On June 20, 2002, the EEOC issued Sanchez notice of his right to commence a lawsuit within 90 days.

Sanchez timely filed a civil action in the U.S. District Court for the Central District of California pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Sanchez's complaint was filed *in pro per* on August 5, 2002. On August 15, 2002, the district court issued a minute order advising Sanchez that he must serve the summons and complaint by December 5, 2002 (within 120 days). Sanchez was also advised that failure to effect service by that date could result in the dismissal of the action without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

Despite this admonition, and several subsequent warnings, Sanchez failed to complete service of process in accordance with federal or California law. Ultimately, on February 25, 2003, the district court issued an order to show cause why the case should not be dismissed for failure to serve the summons and complaint and provided Sanchez with explicit directions as to (1) the steps he needed to take to complete service of process and (2) the consequences of failing to heed its instructions.

The February, 2003, order advised Sanchez exactly how to serve Minson:

> To properly serve defendants, plaintiff may have copies of the summons and complaint personally delivered to defendants (Cal.C.C.P. § 415.10), or, alternatively, may have copies of the summons and complaint left at defendants' place of business with the person in charge thereof, followed by the

> mailing of copies of the summons and complaint by first class mail. (Cal.C.C.P. § 415.20).

Order to Show Cause, p. 2.

When Sanchez failed to complete service of process as instructed, Minson moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(5). On May 8, 2003, the court held a hearing on this matter. Sanchez elected to stand his ground and his case was dismissed without prejudice on May 27, 2003. Sanchez appealed the dismissal, and the Ninth Circuit affirmed.

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split on the Question Presented.

The U.S. Court of Appeals for the Ninth Circuit reviewed the district court's dismissal of Sanchez's complaint pursuant to Fed. R. Civ. P. 4(m) for abuse of discretion. This standard of review appears to have been adopted by every circuit which has considered the issue.[3] *See, e.g., Wei v. State of Hawaii,* 763 F.2d 370, 371 (9th Cir. 1985); *Systems Signs Supplies v. U.S. Dept. of Justice,* 903 F.2d 1011, 1013 (5th Cir. 1990); *Adams v. AlliedSignal General Aviation Avionics,* 74 F.3d 882, 887 (8th Cir. 1996). Citing decisions by the Third, Ninth and Eighth Circuits, the U.S. Court of Appeals for the Second Circuit recently stated in *Thompson v. Maldonado,* 309 F.3d 107, 110 (2nd Cir. 2002): "Although we have not previously determined the standard of review applicable to Rule 4(m) dismissals for failure to serve process, we join our sister

3. The language in Rule 4(m) was previously set forth in Rule 4(j). Some of the court decisions analyzing the issue therefore reference that section.

circuits in reviewing such dismissals for abuse of discretion. [citations omitted]." Because there is no circuit split on the question presented, this Court should not grant review.

II. Dismissal of Sanchez's Complaint was Appropriate Because he Failed to Properly Serve the Summons and Complaint.

Under the Federal Rules of Civil Procedure, a corporate defendant such as Minson can be served by delivering a copy of the summons and complaint to an officer, managing or general agent of the business, or to any other agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. 4(h)(1). Alternatively, a corporation may be served pursuant to the law of the state in which the federal district court is located or the state in which service is effected, which in this case is California. Fed. R. Civ. P. 4(h)(1) and 4(e)(1).

California law provides that a corporation may be served by personally delivering copies of the summons and complaint to an officer of the corporation, the person designated by the corporation as agent for service of process, or a person authorized by the corporation to accept service of process. Cal. Code Civ. Proc. §§ 415.10, 416.10. California law also permits substitute service on a corporate defendant which is accomplished by (1) leaving a copy of the summons and complaint at the defendant's place of business with the person in charge thereof, and (2) thereafter mailing a copy of the summons and complaint by first class mail. Cal. Code Civ. Proc. § 415.20.

Petitioner contends that he completed service by delivering a copy of the summons and complaint to Minson's

office and leaving them with Melissa Davila. Pet. at 6. According to the proof of service filed by Sanchez, his process server delivered the summons and complaint to Ms. Davila, a receptionist, on March 7, 2003. Ms. Davila was never authorized to accept service on behalf of Minson. Personal service is not accomplished upon a corporation simply by delivering a copy of the summons and complaint to its receptionist. *Baade v. Price,* 175 F.R.D. 403, 405 (D.D.C 1997); *see also*, *Kovalesky v. A.M.C. Assoc. Merchandising Corp.*, 551 F. Supp. 544, 546 (S.D.N.Y. 1982). Moreover, Sanchez failed to effect substitute service under California law, because he did not thereafter mail a copy of the summons and complaint to Minson as required by California Code of Civil Procedure Section 415.20. The Petitioner claims that he mailed "numerous copies" of the summons and complaint to Minson, but does not specify when this took place. Pet. at 6. However, the proof of service (dated March 7, 2003) filed by Sanchez establishes that the summons and complaint were *not* mailed by his process server – or anyone else – after the delivery to Minson's receptionist.

Sanchez had earlier filed a proof of service (dated January 9, 2003) indicating that he mailed the complaint to Minson on August 6, 2002. However, that mailing occurred six months *prior* to the issuance of the summons, which was not issued by the district court clerk until March 3, 2003. Both California law and federal law require that a summons and complaint be served together. Cal. Code Civ. Proc. §§ 415.10, 415.20; Fed. R. Civ. P. 4(c)(1); *Cf. Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351-355 (1999) (discussing different state rules for service of process in context of 30-day period for removal to federal court). Obviously, because the *only* mailing occurred before

the issuance of the summons, the summons and complaint were not mailed together.

Sanchez therefore failed to personally serve Minson and failed to complete substitute service pursuant to California Code of Civil Procedure Section 415.20. Because he failed to complete service of process during the 295 days between the filing of his complaint and its dismissal, the district court did not abuse its discretion in dismissing the action without prejudice.

III. Good Cause Did Not Exist to Further Extend the Time for Service Because (a) Sanchez Failed to Follow the Court's Explicit Directions as to How to Complete Service; and (b) Sanchez Insisted that his Efforts to Serve Process were Sufficient.

Rule 4(m) requires service of process to be completed within 120 days after a complaint is filed. "[I]f the district court concludes there is good cause for plaintiff's failure to serve within 120 days, it *shall* extend the time for service. If plaintiff fails to show good cause, the court still *may* extend the time for service rather than dismiss the case without prejudice." *Adams v. AlliedSignal General Aviation Avionics, supra,* 74 F.3d at 887 (court's refusal to grant discretionary extension was not abuse of discretion). Here, the district court granted Sanchez additional time to complete service of process and instructed him exactly how he could accomplish this, but he failed to comply with the court's directions.

Sanchez filed his complaint on August 6, 2002. He was therefore required, pursuant to Rule 4(m), to serve Minson with the summons and complaint on or before December 5, 2002. The district court explicitly advised him of this

requirement in its minute order dated August 15, 2002. A month after this deadline had passed, the district court observed that service had not been completed and issued an order to show cause why the action should not be dismissed.

In response, Sanchez filed a proof of service which established that he had attempted to serve the complaint by mailing it, but had not completed service of process. On February 25, 2003, the district court issued another order to show cause. In that order, the district court *specifically told Sanchez how to complete service* and ordered him to file proof of effective service within 10 days, *i.e.*, on or before March 7, 2003.[4] Although the district court effectively doubled the 120 day period prescribed by Rule 4(m), Sanchez still failed to properly serve Minson within this new deadline.

As discussed above, Petitioner's process server left the summons and complaint with Minson's receptionist, but did not thereafter mail a copy to Minson. Thus, Sanchez did not effect personal service because the person served was not authorized to accept service for the corporation. And he did not complete substitute service because he failed to mail copies of the summons and complaint to Minson after leaving them with the receptionist.

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4. Indeed, Sanchez partially quotes these instructions in his petition, claiming that he complied by (1) leaving a copy with Minson's receptionist on March 7, 2003 and (2) sending by certified mail "numerous copies of the Summons and Complaint." Pet. at 6. What Petitioner fails to acknowledge is that the only copies ever mailed were posted on August 6, 2002, *prior* to the issuance of the summons and months before, not after, delivery to Minson's receptionist.

The district court found no "good cause to again extend the time for service." Pet. App. A, p. 4. This finding was based upon the previous extension of time and Sanchez's "apparent insistence at the 5/8/03 hearing that the actions he has taken to serve defendants are sufficient." *Id.* "To establish good cause, a litigant must demonstrate 'at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.'" *Systems Signs Supplies, supra,* 903 F.3d at 1013. Here, as in *Systems Signs Supplies,* Petitioner offers his *pro se* status and "his repeated attempts to comply with the rules" as evidence of his good faith. *Id.* While these factors "arguably provide grounds for leniency in considering the technical imperfections of service," the district court here, as in that case, "did not abuse its discretion." *Id.* at 1014.

By insisting to the district court that he *had* complied with its instructions, as he continues to do here, Pet. at 6, Sanchez made the same mistake as the plaintiff in *Systems Signs Suppies*: "Instead of looking at the rules more closely or calling the attorney to find out what the problems were, he chose to dispute the validity of service." *Id. Accord, Adams v. AlliedSignal General Aviation Avionics, supra,* 74 F.3d at 887 ("When counsel has ample notice of a defect in service, does not attempt an obvious correction, and chooses to defend the validity of the service attempted, there is no good cause for the resulting delay if that method of service fails." [citation omitted]).

Petitioner should not be permitted to rely on his inexperience to establish good cause for his failure to properly and timely serve Minson because the district court told him exactly what he needed to do. Instead of mailing another copy

of the summons and complaint to Minson, Sanchez chose to stand his ground and insist that his earlier defective mailing was adequate. As the Eighth Circuit stated in *Adams*,

> At some point, a litigant must bear the consequences of conscious strategic or tactical decisions of this kind. Although this dismissal without prejudice may prove to have severe consequences, the district court correctly applied the applicable rules of civil procedure, carefully considered plaintiffs' arguments on the service issues, and gave plaintiffs repeated opportunities to correct their service insufficiencies.

Id. at 887-888.

IV. Petitioner was Afforded Due Process.

Petitioner asserts that the dismissal of his lawsuit violated his due process rights. Pet. at 2-4. His petition recites a litany of inapposite state court decisions to support the proposition that the Constitution guarantees every man his "day in court." What Petitioner fails to appreciate is that he *had* his day in court and that he was afforded due process. By failing to follow the rules of procedure and the clear and simple instructions of the district court, Sanchez forfeited his right to continue his legal action against Minson.

Sanchez attended the May 8, 2003 hearing on Minson's motion to dismiss pursuant to Rule 12(b)(5). In light of Sanchez's insistence that he had properly completed service of process, the district court clearly had the discretion to determine that any further extension of time would be futile. In any event, this hearing amply satisfied Sanchez's due

process rights. *Cf. Blaney v. West*, 209 F.3d 1027, 1030-1032 (7th Cir. 2000) (Due process is not offended by dismissal without advance notice or hearing when adequacy of service issue is presented on reconsideration).

Moreover, due process considerations dictated this outcome because the district court never gained jurisdiction over Minson as a defendant. It is a "bedrock principle" that "[i]n the absence of service of process . . . a court ordinarily may not exercise power over a party the complaint names as a defendant." *Murphy Brothers, Inc., supra*, 526 U.S. at 350, *quoting, Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("'Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.'"); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946) ("Service of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served.'"). As this Court held in *Murphy Brothers*:

> one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.

Murphy Brothers, supra, 526 U.S. at 350.

Considerations of due process and fundamental fairness dictate that Sanchez's lawsuit could not proceed against Minson until he properly completed service of process. The only question which the district court had the authority to decide was whether or not it should exercise its discretion under Rule 4(m) to grant Sanchez yet *another* extension of

time to complete service. The scope of that discretion is "substantial" *Adams, supra,* at 888 and, as the Ninth Circuit Court of Appeals determined below, it was not abused.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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